Supreme Court, U. S.
FILED
SEP 2 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. 75-330

VIJAY V. SATOSKAR, AND ALL OTHERS SIMILARILY SITUATED,
Petitioners,

v.

INDIANA REAL ESTATE COMMISSION, THOMAS DICKSON, EXECUTIVE SECRETARY: WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BIBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOUGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION, STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

M. Daniel Friedland

Attorney for Petitioners

445 N. Pennsylvania St
Indianapolis, Indiana 46204
Telephone: (317) 633-6229

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. _____

VIJAY V. SATOSKAR, AND ALL OTHERS SIMILARILY SITUATED,
Petitioners,

v.

INDIANA REAL ESTATE COMMISSION, THOMAS DICKSON, EXECUTIVE SECRETARY: WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BIBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOUGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION, STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

M. Daniel Friedland

Attorney for Petitioners

445 N. Pennsylvania St
Indianapolis, Indiana 46204
Telephone: (317) 633-6229

TABLE OF AUTHORITIES

CASES	Page
Alyeska Pipeline Service Co. v. Wilderness Society, ___U.S.___, 95 S.Ct. 1612, 43 L.Ed. ___, (1975)	4
Brandenburger v. Thompson, 494 F.2d 885 (C.A.9, 1974)	8
Bright v. Philadelphia-Baltimore-Washington Stock Exchange, 327 F.Supp. 495, (E.D. Pa., 1971)	8
Donahue v. Stauton, 471 F.2d 475, (C.A. 7, 1972)	8
Espinoza v. Farah Manufacturing Co., 94 S.Ct. 334 (1974)	13
Fowler v. Schwartzwalder, 498 F.2d 143 (C.A. 8, 1974)	8
Hall v. Cole, 412 U.S. 1, 93 S.Ct. 1943 (1973).	5
Hoitt v. Vitek, 495 F.2d 219 (C.A. 1, 1974) . .	8
In re Griffiths, 413 U.S. 717 (1973).	13
La Raza Unida v. Volpe, 57 F.R.D. 94 (N.D. Cal., 1972)	4
Lee v. Southern Home Sites, 444 F.2d 143 (C.A. 5, 1971)	8
Merola v. Atlantic Richfield, 515 F.2d 165 (C.A. 3, 1975)	8
Mills v. Electric Auto-Lite Co., 396 U.S. 375, 90 S.Ct. 616 (1970)	5
National Resource Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (C.A. 1, 1973)	6
Newman v. Piggie Park Enterprises Inc., 390 U.S. 400, 88 S.Ct. 964 (1968)	5
Samuel v. University of Pittsburgh, ___ F. Supp. ___ (D.C. W.Pa. 1975)	13
Satoskar v. Indiana Real Estate Commission, ___ F.2d ___, (C.A. 7, 1975)	4
Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777 (1939)	5
Taylor v. Perini, 503 F.2d 899 (C.A. 6 1974). .	8
Townsend v. Edelman, ___ F.2d ___ (C.A. 7, 1975)	13

TABLE OF CONTENTS

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Statement of the Case	2
Reason for Granting the Writ	4
Conclusion	14
Appendix	15

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1975

NO. _____

VIJAY V. SATOSKAR, AND ALL OTHERS SIMILARILY SITUATED,
Petitioners,

v.

INDIANA REAL ESTATE COMMISSION, THOMAS DICKSON, EXECUTIVE SECRETARY: WARD DUNCAN, WILLIAM SCHMIDT, CURTIS HUBER, HARLEY SNYDER, WILLIAM LONG, JAMES BIBILYA, DAVID FAIR, CARL MILLER, REX BREEDEN, DON McCULLOUGH, EUGENE McCLAIN, FRED KELLY, WAYNE SMELTZER, MEMBERS OF THE BOARD OF DIRECTORS OF THE INDIANA REAL ESTATE COMMISSION, STATE OF INDIANA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The Decision of the United States Court of Appeals for the Seventh Circuit is presently unreported, but the decision is set out in Appendix A hereto.

JURISDICTION OF THE COURT

The decision of the United States Court of Appeals for the Seventh Circuit was entered on June 2, 1975; and a Motion for Reconsideration and Suggestion of En Banc was denied on July 14, 1975. This Petition for Writ of Certiorari is being filed within ninety days of the decision of June 2, 1975. This Court's jurisdiction is invoked under 28 U.S.A. §1254 (1).

QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in failing to award attorneys' fees based upon the common benefit doctrine.

STATEMENT OF THE CASE

This case was initiated on the authority of a complaint filed on February 22, 1972, for injunctive and declaratory relief challenging the Indiana Statute which precludes aliens from even applying for a real estate license. The suit was brought pursuant to the Civil Rights Statute 42 U.S.C. §1983 and sought the convening of a three-judge court to strike down the unconstitutional state statute barring aliens from obtaining real estate licenses. On April 19, 1972, the District Court filed an entry dismissing plaintiff's class action, money damages count and attorneys' fees. On May 1, 1972, plaintiff filed an interlocutory

appeal to the U.S. Court of Appeals for the Seventh Circuit for a reversal of the District Court's April 19, 1972 entry. On May 19, 1972, the District Court filed an entry abstaining from determining jurisdiction until plaintiff repaired to the Indiana State Courts. After emasculating plaintiff's complaint by eliminating the count for damages, class action and attorneys' fees, the Court ultimately abstained from the case and mandated plaintiff to repair to State Courts. On May 23, 1972, plaintiff filed a Notice of Appeal from both the Judge's April 19, 1972 and May 19, 1972 entries. On June 18, 1973, the Seventh Circuit reversed the District Court's April 19, 1972 order denying class action, damages and attorneys' fees. The Seventh Circuit also reviewed the May 19, 1972 order of abstention and set up a three judge court to decide the case on the merits. The State then appealed the Seventh Circuit decision by Writ of Certiorari to the United States Supreme Court and certiorari was denied. On August 8, 1973, the three judge panel granted partial summary judgment on the constitutional question, issued a declaration that the Indiana statute was unconstitutional and enjoined the enforcement thereof. The three judge Court then remanded to the District Court the issues of damages and attorneys' fees. Since the Indiana statute precluded aliens from even submitting an application to take the real estate exam, there were no records of other aliens who were denied the opportunity to take the test, and therefore, the class action was dismissed and the litigation proceeded as a test case. On January 25, 1974, the Attorney General filed a Notice of Appeal to the Supreme Court from the three judge decision of December 28, 1973. On the 28th of April, 1974, plaintiff filed a Motion to Dismiss or Affirm in the Supreme Court. On June 10, 1974, the Supreme Court entered an Order affirming the decision of

three judge Court, citing In re Griffiths.

On July 29, 1974, the trial before the District Court was held and the Court denied damages and attorneys' fees. From that holding, plaintiff asked for a review before the United States Court of Appeals for the Seventh Circuit on December 31, 1974. On June 2, 1975, following an intervening, peripheral decision by the United States Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, the Seventh Circuit denied relief for the plaintiff. From that denial, the plaintiff requested reconsideration and suggested an en banc rehearing. The motion for reconsideration was denied on July 14, 1975.

REASONS FOR GRANTING CERTIORARI, III

This Court should grant Certiorari in Satoskar v. Indiana Real Estate Commission, ___F.2d___, (C.A.7, 1975), #74-1946, in order to (1) clarify its decision in Alyeska Pipeline Service Co. v. Wilderness Society, ___U.S.___, 95 S.Ct. 1612, 43 L.Ed.2d___ (1975) insofar as it fails to provide clear guidelines in the application of the common benefit exception following the demise of the private attorney general exception, (2) end the threatened dissonance and confusion between the holding of Alyeska and the actions of lower courts, (3) reevaluate the deleterious implications of Alyeska for public interest litigation, and (4) reverse the Seventh Circuit's unjust and unjustifiable decision in Satoskar.

Prior to this Court's decision last term in Alyeska, there existed five generally accepted exceptions to the American Rule prohibiting the award of attorneys' fees: willful non-compliance with a court order, obdurate bad faith pleading, common fund, common benefit, and private attorney general, La Raza Unida v. Volpe, 57 F.R.D. 94

(N.D. Cal., 1972). The last three exceptions represent a continuum of concept initiated in the decision of Sprague v. Ticonic National Bank, 307 U.S. 161, 59 S.Ct. 777 (1939).

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation--the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree--hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

The broad terms of the language in that opinion were given fuller meaning in this Court's decision in Newman v. Piggie Park Enterprises Inc., 390 U.S. 400, 88 S.Ct. 964 (1968), Mills v. Electric Auto-Lite Company, 396 U.S. 375, 90 S. Ct. 616 (1970), Hall v. Cole, 412 U.S. 1, 93 S. Ct. 1943 (1973). Last term, Alyeska expressly struck down the private attorney general rule, except where Congress explicitly authorized it. In that same opinion, this Court expressly reaffirmed the continued vitality of the common benefit exception, Alyeska, fn. 39, at 1625.

The common fund exception was first expressly enunciated in Sprague. In this decision, it was first recognized that in actions similar to shareholders' derivative actions, the final result of the case accrued to the ultimate good of the defendants as well as the plaintiffs. Consequently, it would be proper to assess the fund

established by the suit to provide for the payment of the successful attorneys' fees. In 1968, the Supreme Court in Newman painted in broad terms the importance of facilitating the use of the courts for the vindication of constitutional rights and the consequent necessity to award attorneys' fees to aid in this effort.

> When a plaintiff brings an action under that Title, he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general', vindicating a policy that Congress considered of the highest priority. If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts.

A synthesis of these two concepts first occured in Mills, in which the common fund exception to the American Rule was extended to the award of attorneys' fees in those cases where the final result provided an identifiable benefit which was to the ultimate good of the defendant. One result of this decision was that many of the circuit and district courts of the federal judiciary went one step further and combined the result of Mills with the dictum of Newman and the liberal private attorney general doctrine appeared, e.g. National Resource Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (C.A.1, 1973). The private attorney general exception to the American Rule was initially utilized in cases where a strong Congressional policy was being implemented. In other words, the ultimate beneficiary was the United States and its citizens, and they should aid in covering the expenses of this effort.

Eventually, the phrase "strong Congressional policy" became virtually synonymous with almost any Constitutional right or privilege. In Hall, the Supreme Court explicitly refused to either endorse or reject this approach, choosing rather to further refine the common benefit doctrine. The silence of the Court concerning private attorney general came to an end in Alyeska. There, this Court held that only the four other judicially created exceptions to the American Rule were valid, specifically eliminating the private attorney general doctrine.

The private attorney general doctrine can be viewed as a logical extension of the basic concepts of the common benefit exception, National Resource, at 1333-1334. Just as the common benefit rule allows an award of fees when the result of the suit is to provide a substantial benefit to the ultimate beneficiaries, the defendants, the private attorney general rule allowed an award of fees when the result of the suit was to provide a substantial benefit (i.e. the vindication of a strong Congressional policy) to the ultimate beneficiaries generally characterized as the general citizenry. Moreover, the lack of precise requirements for qualifying as a private attorney general made it a favored instrument of crusading counsels and activist jurists. The glib popularity of the private attorney general doctrine contributed to its demise. The obvious appeal of acting as a private attorney general substituted for judicial evaluation of the strength of the Congressional policy and the depth of the benefit conferred by the vindication of that constitutional right. Concommitantly, on the more staid end of the fee award scale, common benefit fell into general disuse.[1]

---

1 The best evidence of the relative use of the

These circumstances have resulted in lack of understanding and consequent confusion in the lower courts as to the state of the common benefit exception following Alyeska, even as it reaffirmed the language of Hall, Alyeska, fn. 39 at 1625. A result of this confusion has been the Seventh Circuit's action in Satoskar. The primary difficulty lies in the establishing of guideposts as to what benefits achieve the threshold quality level to meet the necessary requirement of substantiality.

In Hall, a union member was excluded from his union for "villifying" a union official. The court affirmed the liability of the union and then went on to award attorneys' fees, based upon the common benefit exception. It did so by determining that the suit had conferred a substantial benefit to the defendant union by contributing to the furtherance of free speech within the union, Hall, at 1948.

In a strikingly similar case, Bright v. Philadelphia-Baltimore-Washington Stock Exchange, 327 F. Supp. 495 (E.D. Pa., 1971), a stock exchange member was found to have been wrongfully excluded from participation within the organization's

two exceptions (common benefit and private attorney general) is that in the period from the time of the Mills decision until the time of the decision in Alyeska, one of the circuits awarded fees based upon common benefit, Merola v. Atlantic Richfield, 515 F 2d 165 (C.A. 3, 1975), while private attorney general was utilized in, at least six: Hoitt v. Vitek, 495 F. 2d 219 (C.A. 1, 1974), Lee v. Southern Home Sites, 444 F 2d 143 (C.A. 5, 1961), Taylor v. Perini, 503 F 2d 899 (C.A. 6, 1974), Donahue v. Stauton, (C.A. 7, 1972), Fowler v. Schwartzwalder, 498 F. 2d 143 (C.A. 8, 1974), Brandenburger v. Thompson, 494 F. 2d 885 (C.A. 9, 1974).

structural election. That court awarded attorneys' fees, based upon the common benefit exception. It did so by determining that the suit had conferred a substantial benefit to the defendant stock exchange by contributing to the responsiveness of the intraorganizational governing institutions of the exchange, Bright, at 506.

In Satoskar, Indiana had a statute which prohibited the entry of aliens into that state's real estate profession. Vijay Satoskar, in an effort to eliminate the unfair statute, took the licensing entity to Court. This Court granted summary affirmance to the decision of three judge panel which struck down the Indiana statute, leaving the matter of fees and damages to the lower courts.

The ultimate beneficiary in Satoskar is both small and easily identifiable, Alyeska, fn. 39 at at 1625. It is the Indiana Real Estate Commission and the agents that it licenses. The Indiana Real Estate Commission is no longer shackled by an unconstitutional law and, consequently, is enabled to increase the quantity of qualified real estate agents in Indiana. In being able to do so, the Indiana Real Estate Commission and the agents can more completely fulfill their functions and thus broaden their competency, esteem, and base within the state.

Thus, in each of these cases, a basic paradigm of law exists. A single-interest service organization is involved in each case. A member of each organization, after being wrongfully excluded, took their organization to court to remedy the situation. The union violated the United States Constitution, the stock exchange violated its by-laws, and the Indiana Real Estate Commission violated the United States Constitution. Each violation served to exclude a person from a position within the organization. The resolution of the two prior cases (Hall

and Bright) against the respective organizations was found, by the courts, to be for the ultimate benefit of the organization. A fortiori, then, as the ultimate benefit in Satoskar belongs to the organization, the Indiana Real Estate Commission; this is a case where the common benefit doctrine, as set out in Hall and Alyeska, ought rightfully to apply.

Contrary to these results, the Seventh Circuit in Satoskar ignored the holdings of Sprague, Mills, Hall and Alyeska and refused to even reach beyond the fees' question. In doing so, it held that,

> There is no effective way in the instant case to levy fees against a benefited class...Any benefit to resident aliens of Indiana is merely theoretical and not reducible to monetary figures.

In that short passage the Appeals court succeeded in truncating the Alyeska requirement of a "small and easily ascertainable class" of beneficiaries, Alyeska, fn. 39 p. 1625, by distorting the common benefit doctrine by confusing the plaintiffs with the benefited party and thus undermining the entire retaionale of fee-shifting, which is basic to common benefit, Mills at 625. Moreover, it effectively negates Mills, Hall, and Alyeska by requiring a monetary benefit, while the above cases all hold that the benefit accrued need not be monetary in nature. Alyeska specifically upheld both common fund and common benefit exceptions to the American Rule, fn. 39 p. 1625.

Pro bono publico has always permitted fees at scaled down per hour figures. Where an anti-trust or securities lawyer could expect from $50-$100 per hour for winning, the constitutional lawyer is faced with the bleak prospect that if he

gets far-reaching reform for his client in a tough case, he gets a slap on the back and no money, but if he rejects the reform and goes for a money settlement, he may be compensated, despite the sacrifice of constitutional principles. In the real world, it is unfair to place any citizen in that position. The language of this decision in Satoskar places an excruciating chilling effect upon the workings of a society that is accustomed to utilizing the legal system as a means to curb unjust laws and further the principles and ideals of our founding fathers.

It is axiomatic to the lay public that the operation of justice in the United States mandates courts that are equally available for all. In an ideal sense, this remains true. Any person may file in the courts of the country. Yet, especially in suits which concern complex questions of law, such as this one, it is necessary to have a lawyer. Attorneys cost money. If the ability of constitutional litigants to obtain fees from the other side is further abrogated, even in victory, then the court system will have made a conscious decision in favor of stare decisis over the rights and interests of all the citizens of the nation.

What has occurred in the latest decisions has been a blurring of the fact that while three of these exceptions to the American Rule share a common heritage and thus have some similarities, that each exists as an independent entity and that the subsequent reduction of one of the exceptions does not reduce any of the other exceptions' essential qualities, except insofar as it partakes of the forbidden entity. The crucial decision then becomes one of determining the degree, if any, of overlap between the allowed and the unallowed, common benefit and private attorney general.

If the effective emasculation of the common

benefit exception to the American Rule by the Seventh Circuit is allowed to stand, that decision can have but one result on the pursuit of justice in this society. If people could exist in society without having to "pay" their way, the issue of attorneys' fees would be of no import. However, it is necessary for people to have money to survive in our society. Consequently, attorneys are being presented with a Hobson's choice by the Satoskar decision, even more so than that provided by the language of Alyeska. If the attorney chooses reform he loses his chance for compensation. If he settles for money out of court, he loses the opportunity to achieve real reform.

The devastating impact of this decision lies, not as much with the attorneys, for if an attorney is deprived of his pro bono work he will find paying clients elsewhere, but with the people who now will be unable to obtain competent counsel in their efforts to vindicate constitutional rights. As result of this opinion, constitutional litigants will lack competent counsel for the fact that a lawyer cannot live on righteousness alone. Consequently, the ultimate loser from the end of the common benefit exception will be the citizen who is unable to afford the costs inherent in obtaining competent counsel in a complex constitutional case and the lengthy ensuing court battle. Thus, the equal access to the courts of justice, which every American schoolchild knows to be true, will only be true in school. For in the federal courtrooms, unless the onerous effects of the Satoskar decision are rectified, only the wealthy will have the fair and just access to the courts to which all Americans are entitled.

Another basis for granting Certiorari was the erroneous application of the bad faith pleadings exception to the American Rule. The tendency of deep-pocket defendants, such as the Indiana Real

Estate Commission, to prolong the appeals process beyond the point of reasonableness in an effort to outlast the less endowed party to the litigation is a practice which is patently unjust. Especially in a situation such as this, where an on-point authority, In re Griffiths, 413 U.S. 717, clearly controlled. The Indiana Real Estate Commission took a direct appeal to this court from the findings of the three-judge panel, arguing that there was a substantial federal question of equal protection in that Espinoza v. Farah Manufacturing Co., 94 S.Ct. 334 (1974) tempered the holding of In re Griffiths. In an earlier writ, the Commission unsuccessfully argued that abstention was proper in that despite In re Griffiths, there was no constitutional issue involved in alien licensing.

If an alien can practice law, an alien can surely obtain a real estate license. The Indiana Real Estate Commission cannot provide a legitimate basis for pressing that appeal to this Court. This Court in a summary affirmance agreed with the lower panel and cited In re Griffiths as its whole opinion. The repeated and dilatory appeals accomplished only one objective, it delayed plaintiff's right to obtain a license. While the courts are always open to legitimate legal challenges, judicial economy would dictate that frivolous appeals brought by parties with unequal financial resources be deterred. Therefore an award of counsel fees would further the policy of judicial econometrics by discouraging bad faith appeals in such situations.

The misapplication of the common benefit doctrine in Satoskar is merely symptomatic of the confusion which currently reigns in the lower courts following Alyeska, see Townsend v. Edelman, ___F.2d ___, (C.A.7, 1975), #73-1960 & #73-1961 and Samuel v. University of Pittsburgh, ___F.Supp.

___, (D.C., W.Pa., 1975). This confusion will heighten further in the days ahead as attorneys across the country scramble to obtain recompense for their efforts in the broad range of cases affected, from shareholders' derivative suits to 42 U.S.C. 1983, civil rights actions.

The Supreme Court has a responsibility to establish viable criteria for the assessment of the award of attorneys' fees in litigation of common concern. A balancing test should be forged that awards fees based upon a substantial common benefit conferred and denying fees where the rights vindicated are more personal in nature. Affirmative action by this Court is necessary to create order where confusion currently reigns in determining whether an award of counsel fees is justified in public interest litigation.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the decision of the Seventh Circuit of Appeals for the Seventh Circuit.

Respectfully submitted,

Mr. Daniel Friedland

Attorney for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

ARGUED APRIL 9, 1975
DECIDED JUNE 2, 1975

Before Pell, Stevens, and Tone, Circuit Judges

Tone, Circuit Judge: The issue in this appeal is whether the District Court properly denied a request for the awarding of attorneys' fees against the State and Indiana and state officials who were defendants in their official capacities. In the underlying suit, plaintiff was successful in challenging the constitutionality of the Indiana statute precluding aliens from applying for or obtaining real estate licenses, but did not prevail on the class and damages aspects of the case.

The history of the case was this: A single judge abstained from deciding the constitutional question, but his decision was reversed and remanded for the convening of a three-judge court, 478 F.2d 1405 (7th Cir., 1973), cert. denied 414 U.S. 1004 (1973). On remand, the statute was declared unconstitutional, and the Supreme Court summarily affirmed, citing In re Griffiths, 413 U.S. 717 (1973), 417 U.S. 938 (1974). The case then proceeded to trial before a single judge on the issues of damages and attorneys' fees. On September 11, 1974, in the order now before us, the District Court denied both damages and fees.

The District Court denied the request for fees on the ground that the Eleventh Amendment

bars any monetary recovery against the state, and, since the officials are defendants in their official capacities only, any award against them would be, in effect, an award against the state. We affirm the judgment but do so without reaching the Eleventh Amendment question.

Plaintiff recognizes the American Rule that the prevailing party is not ordinarily entitled to recover his attorneys' fees from the losing party but argues that his case comes within several judicially created exceptions to that general rule: (1) that by securing injunctive and declaratory relief he has conferred a common benefit on a group of people whose constitutional rights had been violated: (2) that he has acted as a private attorney general in effectuating a strong Congressional policy: (3) that he should receive attorneys' fees based on "this Court's inherent equitable power to shift the attorneys fees to defeated defendants in 1983 actions": and (4) that defendants have acted obstinately and in bad faith in "pursuing frivolous appeals". Plaintiff further argues that the Eleventh Amendment, contrary to the conclusion of the District Court, does not bar recovery of attorneys' fees from the state or state officials being sued in their official capacities.

Since oral argument in this case, the Supreme Court has held in Alyeska Pipeline Service Co. v. The Wilderness Society, ___U.S. ___, 43 U.S.L.W. 4561, 4568 (1975), that in the absence of express statutory authority the federal courts do not have inherent judicial power to award fees based on the "private attorney general" approach or on their views as to the social importance of the policy underlying the statute under which the plaintiff sues. Thus, plaintiff's second and third arguments have been conclusively rejected by the Supreme Court. The Court also noted the limits of

the "common fund and common benefit" justification for awarding fees; that in all the cases upholding awards on that basis, "the class of beneficiaries was small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefitting."...U.S. at n.39, 43 U.S.L.W. at 4569, n. 39. There is no effective way in the instant case to levy fees against a benefited class for the reasons that presumably led the District Court to reject the class and damages allegations of the complaint: Any benefit to resident aliens of Indiana is merely theoretical and not reducible to monetary figures: the class suffers problems of indefiniteness: and thus the means of identifying either benefit or class with requisite accuracy are lacking. To assess attorneys' fees against the state is inappropriate because that would impose a share of the cost on all citizen taxpayers and not just on the aliens directly benefited. If it is to be asserted that all citizens have in fact benefited from the vindication of constitutional principles, the "common benefit" theory would merge into the "private attorney general" approach, which as we have said has been rejected by the Court in Alyeska Pipeline.

There remains the question of whether there was "bad faith" on the part of the state or its officials that would justify a fee award. The standards for bad faith are necessarily stringent. Compare Sims v. Amos, 340 F.Supp. 691, 693-694 (M.D. Ala. 1972), aff'd. 409 U.S. 942 (1972), with Donahue v. Staunton, 471 F.2d 475, 482-483 (7th Cir. 1972), cert, denied 410 U.S. 955 (1973), and see discussion of the two in Alyeska Pipeline, ___ U.S. at ___n. 46, 43 U.S.L.W. at 4571, n. 46. The prosecution of timely appeals on the merits of a case does not show bad faith, especially where, as here, the defendants were acting on the advice of

the state Attorney General, who represented them throughout the course of this litigation and where the issue involved had been the subject of an intervening Supreme Court decision (In re Griffiths, supra, 413 U.S. 717) which was not on all fours with the instant case. We have been referred to no evidence that would support a finding that the appeals were taken in bad faith.

As a result of our conclusion that no proper basis existed on which the District Court could have justified an award of fees, we affirm the order denying fees without reaching the question whether the Eleventh Amendment precludes an award of fees against the state or its officials.* This

* The disagreement among the circuits on this question is described but not resolved in footnote 46 of the Alyeska Pipeline opinion, ___U.S. at ___ n. 46, 43 U.S.L.W. at 4571 n. 46. It should also be noted that there is an intra-circuit split in both the Fifth and Sixth Circuits: compare Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), petition for cert. filed 43 U.S.L.W. 3240 (U.S. Oct. 9, 1974) (No. 74-403), with Milburn v. Hueker, 500 F. 2d 1279, 1282 (6th Cir. 1974), and see Taylor v. Perini, 503 F.2d 899, 911-912 (6th Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3281 (U.S. Oct. 30, 1974) (No. 74-506): and compare Gates v. Collier, 489 F.2d 298 (5th Cir. 1973), rehearing en banc granted, 500 F.2d 1382 (1974) and Norman v. Alabama, 503 F.2d 1320, 1321 n.1 (5th Cir. 1974) (hearing en banc on the issue of attorneys' fees) with Named Individual Members of San Antonio Conservation Society v. Texas Highway Department, 496 F.2d 1017, 1025-1026 (5th Cir. 1974), rehearing en banc granted, 496 F.2d 1026 (1974). Petitions for certiorari are pending in three cases, Jordon v. Gilligan and Taylor v. Perini, as noted above, and Skehan v. Board of Trustees of Bloomsburg State College, 501 F.2d 31 (3rd Cir. 1974), petition for cert. filed, 43 U.S.L.W. 3296 (U.S. Nov. 8, 1974) (No. 74-558).

result is in accord with that reached in Townsend v. Edelman (Nos. 73-1960, 73-1961, June 2, 1975), decided this day by another panel of this court.

AFFIRMED